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This memorandum is the corrected version and should replace the previous version that was dated October 23, 2019.

MEMORANDUM October 25, 2019

SUBJECT: Constitutionality of Alaska Hire statute
(Work Order No. 31-LS1210)

TO: Senator Bill Wielechowski
Attn: David Dunsmore

FROM: Daniel C. Wayne
Legislative Counsel

An October 3, 2019, legal opinion by Attorney General Kevin Clarkson concluded that AS 36.10.150, known as the "Alaska Hire" statute, violates the privileges and immunities clause of the U.S. Constitution[1] and the equal protection clause of the Constitution of the State of Alaska.[2] You have asked if these conclusions are legally correct.

Because of the separation of powers doctrine, it is the province of the court, not the executive or legislative branch, to declare that a law is unconstitutional.[3]

It is the executive branch's duty to faithfully execute the laws.[4] A state executive agency has the power to declare a state statute unconstitutional only in certain circumstances.[5] In *Kodiak Island Borough v. Mahoney*, the Alaska Supreme Court found a clerk's power to

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[1] Article IV, sec. 2, clause 1, U.S. Constitution.

[2] Article I, sec. 1, Constitution of the State of Alaska.

[3] *State v. Murtagh*, 169 P.3d 602, 609 (Alaska 2007).

[4] Article III, sec. 16, Constitution of the State of Alaska.

[5] *Kodiak Island Borough v. Mahoney*, 71 P.3d 896, 900 (Alaska 2003); *O'Callaghan v. Coghill*, 888 P.2d 1302, 1304 (Alaska 1995). *See also Boucher v. Bomhoff*, 495 P.2d 77, 79 (Alaska 1972) ("Early in this country's jurisprudence it was established that we are a government of laws, not of men, and that the task of expounding upon fundamental constitutional law and its application to disputes between various segments of government and society rests with the judicial branch of government.") (citing *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803)).

reject a clearly unconstitutional initiative proposal is analogous to the authority of executive agencies to abrogate a statute which is clearly unconstitutional under a United States Supreme Court decision dealing with a similar law.[6] The court acknowledged, "[I]t is the courts, not the clerk or the executive, that are primarily responsible for constitutional adjudication." However, the court went on to explain:

> in order to avoid a waste of resources and needless litigation it is right that the latter should have the power to refuse to give life to proposals or laws that are clearly unconstitutional. In the case of executive agencies we have held that they have authority to "abrogate a statute which is clearly unconstitutional under a United States Supreme Court decision dealing with a similar law, without having to wait for another court decision specifically declaring the statute unconstitutional."[7]

The Court stated an example of a clearly unconstitutional initiative would be one proposing an ordinance that would mandate local school segregation based on race.[8] It held, "a clerk . . . should only reject a petition that violates any of the liberally construed statutory or constitutional restrictions on initiatives or that proposes a substantive ordinance where controlling authority establishes its unconstitutionality."[9]

In *O'Callaghan v. Coghill*, (*O'Callaghan I*), the court determined that the Division of Elections, as an executive branch agency, has authority to abrogate a statute that is clearly unconstitutional under a United States Supreme Court decision.[10] As support for its holding, the court relied on *Wade v. Nolan*, in which the court upheld the governor's authority to reapportion Alaska's Senate districts to base them on population instead of area, without waiting for a court decision specifically holding Alaska's Senate districts unconstitutional.[11] The governor acted after the United States Supreme Court ruled that the equal protection clause of the Fourteenth Amendment requires both houses of state bicameral legislatures to be apportioned on a population basis so that the resulting districts have substantially equal populations.[12]

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[6] *Mahoney*, 71 P.3d at 900.

[7] *Id.*

[8] *Id.* at 900 n.22.

[9] *Id.* at 900.

[10] 888 P.2d 1302, 1304 (Alaska 1995).

[11] 414 P.2d 689 (Alaska 1966).

[12] *Id.*

In *O'Callaghan v. State*, (*O'Callaghan III*), the court found that the Division of Elections had authority to abrogate a blanket primary election statute that was clearly unconstitutional under a United States Supreme Court decision issued just before the election.[13]

In this instance the relevant law is unsettled, and, in the attorney general's analysis, there is not a particular set of facts at issue; therefore, it is premature and outside of the attorney general's authority to declare AS 36.10.150 unconstitutional and refuse to enforce it. That does not mean that a court may not ultimately conclude that the statute as applied to a particular set of facts is unconstitutional or that the legislature had insufficient justification for it. There are constitutional limits on laws requiring a resident hiring preference, and AS 36.10.150 may be vulnerable to a legal challenge based on one or more of those limits, depending on the applicable facts and state interests.

AS 36.10.150 provides:

> **Sec. 36.10.150. Determination of zone of underemployment.**
> (a) Immediately following a determination by the commissioner of labor and workforce development that a zone of underemployment exists, and for the next two fiscal years after the determination, qualified residents of the zone who are eligible under AS 36.10.140 shall be given preference in hiring for work on each project under AS 36.10.180 that is wholly or partially sited within the zone. The preference applies on a craft-by-craft or occupational basis.
> (b) The commissioner of labor and workforce development shall determine the amount of work that must be performed under this section by qualified residents who are eligible for an employment preference under AS 36.10.140. In making this determination, the commissioner shall consider the nature of the work, the classification of workers, availability of eligible residents, and the willingness of eligible residents to perform the work.
> (c) The commissioner shall determine that a zone of underemployment exists if the commissioner finds that
> (1) the rate of unemployment within the zone is substantially higher than the national rate of unemployment;
> (2) a substantial number of residents in the zone have experience or training in occupations that would be employed on a public works project;
> (3) the lack of employment opportunities in the zone has substantially contributed to serious social or economic problems in the zone; and
> (4) employment of workers who are not residents is a peculiar source of the unemployment of residents of the zone.

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[13] 6 P.3d 728, 731 - 732 (Alaska 2000).

AS 36.10.150 and any other state law that requires or induces employers to hire employees based on Alaska residency[14] is subject to state and federal constitutional limitations. Because AS 36.10.150 requires in certain circumstances discrimination against nonresidents in employment matters by establishing a resident hire preference, it poses significant, but unsettled, issues under the state constitution's equal protection clause and the federal constitution's privileges and immunities clause. It also raises issues under the federal constitution's equal protection clause and interstate commerce clause. These state and federal constitutional provisions limit the authority of states to require or induce employers to discriminate between residents and nonresidents in hiring.

State Equal Protection Clause

Article I, sec. 1 of the Constitution of the State of Alaska states, among other things, "that

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[14] A hiring preference for resident workers in the oil and gas industry is also addressed in both the Alaska Stranded Gas Development Act (ASGDA) (AS 43.82) and the Alaska Gasline Inducement Act (AGIA) (AS 43.90). In ASGDA, AS 43.82.230(a) reads, in part:

> Within the constraints of law, the commissioner shall also include in a contract under AS 43.82.020 a term that requires the qualified sponsor or qualified sponsor group and contractors of the qualified sponsor or qualified sponsor group to employ Alaska residents and to contract with Alaska businesses to work in the state on the approved qualified project to the extent the residents and businesses are available, competitively priced, and qualified.

A similar provision in AGIA required applicants for the license to commit to hire residents to the extent allowed by law. AS 43.90.130(15), one of the so-called "must haves" for an AGIA application to be accepted, states that application for the license must, to the "maximum extent permitted by law, commit to

> (A) hire qualified residents from throughout the state for management, engineering, construction, operations, maintenance, and other positions on the proposed project;
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> (B) contract with businesses located in the state;
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> (C) establish hiring facilities or use existing hiring facilities in the state; and
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> (D) use, as far as is practicable, the job centers and associated services operated by the Department of Labor and Workforce Development and an Internet-based labor exchange system operated by the state;

The resident hire preferences in these oil and gas statutes are expressly limited; if another law does not permit the preference, the preference may not be implemented. These provisions leave discrimination in favor of resident hire somewhat open and at the discretion of the sponsor in ASGDA and the applicant in AGIA.

all persons are equal and entitled to equal rights, opportunities . . . ."

In 1988, the legislature proposed, and the voters approved, a state constitutional amendment. That provision, adopted at the November 1988 general election and effective January 4, 1989, says:

> **Resident Preference.** This constitution does not prohibit the State from granting preferences, on the basis of Alaska residence, to residents of the State over nonresidents to the extent permitted by the Constitution of the United States.

The author of the resolution proposing the addition, then-Representative Dave Donley, provided this statement for publication in the 1988 general election voter information pamphlet:

> Voter approval of Ballot Measure No. 1, a proposed amendment to Alaska's Constitution to give the state clear authority to grant certain preferences to its own citizens consistent with the U.S. Constitution, will give state resident preference laws a fighting chance in the courts.
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> . . . .
>
> [T]he Alaska Constitution's equal protection clause is written differently than the U.S. Constitution's equal protection clause and the Alaska equal protection clause has been interpreted as being more restrictive than the federal clause.
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> . . . .
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> [I]t doesn't make any sense for Alaska's Constitution to prohibit our state from adopting laws to protect our own residents when those same laws are permitted under the federal constitution and in other states.

Since its adoption, consideration of art. I, sec. 23, Constitution of the State of Alaska, has been critical to any debate about public employee residency requirements in Alaska; however, its effect is arguably uncertain because, in the only reported decision weighing the scope of art. I, sec. 23, the Alaska Supreme Court declined to rule on the question of whether or not it makes the Alaska equal protection clause irrelevant to resident preference in hiring.[15] At this point it can only be hypothesized that future courts will

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[15] In *Pub. Ret. Sys. v. Gallant*, 153 P.3d 346 (Alaska 2007), involving the challenge of a statute granting a cost of living allowance to state retirees who reside within the state after retirement, the Alaska Supreme Court reviewed a lower court ruling rejecting an argument that only the more relaxed standards of the federal constitution should be applied because of art. I, sec. 23, Constitution of the State of Alaska. The Court said that "[b]ecause we conclude that the COLA does not violate equal protection under the

rule that art. I, sec. 23 eliminates the Alaska equal protection clause as an impediment to resident preference in hiring. Because of this uncertainty, a declaration that AS 36.10.150 is clearly unconstitutional is premature and unreasonable.

In 1989, without consideration of art. I, sec. 23, the Alaska Supreme Court discussed the importance of the opportunity to work, in *State v. Enserch Alaska Construction,* and noted as follows:

> While the right to earn a living is not a fundamental right under the federal equal protection clause, we have noted that the right to engage in an economic endeavor within a particular industry is an "important" right for state equal protection purposes.[16]

The Court went on to explain its rationale for deciding not to uphold a state law granting employment preference to residents of economically distressed regions within the state, as follows:

> The legislative findings explain that the act was enacted to "reduce unemployment among residents of the state, remedy social harms resulting from chronic unemployment, and assist economically disadvantaged residents." Ch. 33, § 1, SLA 1986. Thus, the statute represents an attempt to preserve the social structure in an economically distressed zone by providing employment opportunities for qualified workers on state-funded construction projects there.
>
> While these goals are important, they conceal the underlying objective of economically assisting one class over another. We have held that this objective is illegitimate. In *Lynden Transport, Inc. v. State*, 532 P.2d 700, 710 (Alaska 1975), we ruled that "discrimination between residents and nonresidents based solely on the object of assisting the one class over the other economically cannot be upheld under . . . the . . . equal protection clause[]." While that case involved discrimination between state residents and nonresidents, the principle is equally applicable to discrimination among state residents. We conclude that the disparate treatment of unemployed workers in one region in order to confer an economic benefit

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Alaska constitution, it is unnecessary for us to determine whether article I, section 23 applies."

[16] *State v. Enserch Alaska Construction, Inc.*, 787 P.2d 624, 632 (Alaska, 1989); citing *Commercial Fisheries Entry Comm'n v. Apokedak*, 606 P.2d 1255, 1266 (Alaska 1980). See also, *Malabed v. North Slope Borough,* 70 P.3d 416, 420 - 421 (Alaska 2003) (affirming a sliding scale test and that state equal protection clause affords greater protection than federal).

> on similarly-situated workers in another region is not a legitimate legislative goal.
>
> This conclusion essentially ends our inquiry. That the legislature also hoped to preserve the social structure of economically distressed areas cannot be viewed as a purpose separate from that of aiding the residents of such areas. It would not make sense to conclude that a statute may not discriminate between residents of two areas in order to aid the residents of the more disadvantaged area, but that such a statute could discriminate between residents of two areas in order to aid the communities in the more disadvantaged area. The communities are merely the collective sum of the residents. Our constitution guarantees the rights of "persons," not communities viewed separately from the people who constitute the communities.[17]

The opinion of Attorney General Clarkson regarding equal protection under the Alaska Constitution is largely based on an argument that the Alaska Hire statute is unconstitutional because of *Enserch.*[18] While the statute is vulnerable to some of the same reasoning applied in *Enserch*, the effect of art. I, sec. 23, Constitution of the State of Alaska, on the Court's ultimate ruling is still unknown. That is not insignificant, as the constitutional amendment was intended as an antidote to *Enserch.*

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[17] *Enserch*, at 634 (footnotes omitted).

[18] 2019 Op. Alaska Att'y Gen. (Oct. 3). According to the attorney general:

> The Alaska Supreme Court's decision in *Enserch* invalidated the "economically distressed zone" provision of Alaska Hire (AS 36.10.160) but did not consider the "zone of underemployment" provision (AS 36.10.150). In April 1988, before the Court decided *Enserch*, the Commissioner of the Department of Labor and Workforce Development designated the entire State a "zone of underemployment" due to abnormally high levels of unemployment. In 1990, after the Court decided *Enserch*, Attorney General Doug Baily advised Labor Commissioner Jim Sampson that *Enserch* prohibited the regional application of AS 36.10.150, but did not prohibit the Department's statewide application of AS 36.10.150. Notably, the Attorney General's analysis was strictly limited to the *Enserch* opinion, and did not consider whether the state-wide designation would offend the U.S. Constitution's Privileges and Immunities Clause. Since receiving this opinion, the Department of Labor and Workforce Development has consistently designated the entire State as a "zone of underemployment."

Id. at 4 - 5 (footnotes omitted).

U.S. Constitution's Equal Protection Clause

Because the U.S. constitution's equal protection clause is unaffected by amendments to state constitutions and can be applied in state courts as well as federal courts, it is a relevant consideration. The clause arises under the Fourteenth Amendment to the United States Constitution, which reads: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Federal constitutional equal protection analysis incorporates as a method a means-end analysis, asking first whether the government is pursuing a permissible end, and then asking whether the law is an adequate means toward achieving the government's end. In 1983, the United States Supreme Court said that there is no fundamental right or suspect class involved in an equal protection analysis of a resident preference.[19] Resident hire statutes should therefore be subject only to rational basis analysis under the federal equal protection clause. Under the rational basis test the statute need only be rationally related to a legitimate government purpose.

When weighing legitimate governmental purposes against equal protection rights, the U.S. Supreme Court has shown flexibility in the amount of discrimination it will tolerate. In *City of New Orleans v. Dukes*, 427 U.S. 297 (1976), the Court considered a grandfather clause of an amendment to a New Orleans ordinance that created two classes of pushcart vendors — one of which was allowed to sell in the French Quarter and the other was not — based on the length of time they had operated within the French Quarter before the amendment. The Court said that the amendment did not deny equal protection in violation of the federal constitution because the ordinance was solely regulation of an economic activity with a legitimate government purpose, and it was rational for the city, in choosing to exempt some vendors from the restriction, to base the choice on length of past operations.

Federal Privileges and Immunities Clause

Alaska courts have determined that past versions of resident hiring preference statutes in Alaska discriminate against out-of-state residents in violation of the privileges and immunities clause, art. IV, sec. 2, Constitution of the United States, which reads: "The citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states."

In *Robison v. Francis,* a previous state statute requiring local hire on public works projects in Alaska was challenged on the basis that it violated the federal constitution's privileges and immunities clause.[20] The state argued that U.S. Supreme Court precedent in *United Building & Construction Trades Council of Camden County and Vicinity v.*

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[19] *Martinez v. Bynum*, 461 U.S. 321, 328, n.7 (1983) (a bona fide residence requirement implicates no "suspect" classification, and therefore is not subject to strict scrutiny).

[20] 713 P.2d 259 (Alaska 1986).

Mayor and Council of the City of Camden, 465 U.S. 208 (1984), was grounds to uphold the challenged statute, but the Alaska Supreme Court observed that "employment in the construction industry must be considered a fundamental right entitled to the protection of the privileges and immunities clause."[21] The Court said the federal constitution's privileges and immunities clause precludes discrimination against the fundamental rights of nonresidents unless there is substantial justification for the state's discriminatory action, and distinguished the facts and circumstances cited in support of the state statute from those supporting the City of Camden's ordinance in the U.S. Supreme Court case. The Court said the purpose of the clause is "to prevent states from enacting measures which discriminate against non-residents for reasons of economic protectionism."[22]

In 1948 the U.S. Supreme Court said of the privileges and immunities clause that it "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy."[23] Later, in *Hicklin v. Orbeck*, the U.S. Supreme Court determined that state ownership of the oil and gas relevant to a resident hire preference required under a previous version of "Alaska Hire" that allowed discrimination against nonresidents was not sufficient to exempt the statute from the requirements of the privileges and immunities clause. The Court determined that because the state had not shown that nonresidents actually caused local unemployment, the statute's blanket preference for hire of state residents did not bear a close relation to combating the peculiar evil of nonresidents taking local jobs. Instead, the Court reasoned, the influx of out-of-state workers was likely only a symptom of the lack of education and skills and geographical remoteness of the local population.[24]

The current version of Alaska Hire is different than the version rejected in *Hicklin v. Orbeck*, but whether those changes are sufficient to withstand a challenge based on the reasoning in *Hicklin v. Orbeck* is an open question and may turn on the facts presented. Until that question is answered definitively by a court, it is unreasonable and premature to declare AS 39.10.150 clearly unconstitutional.

As noted in the opinion by Attorney General Clarkson, the reasoning in at least one recent court decision — *McBurney v. Young* — would support a challenge to the current version of Alaska Hire based on the privileges and immunities clause.[25] In that case, a party alleged that Virginia's Freedom of Information Act (FOIA) abridged his

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[21] *Id.* at 265.

[22] *Robison*, at 263, citing *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985).

[23] *Toomer v. Witsell*, 334 U.S. 385, 395 (1948).

[24] *Hicklin v Orbeck*, 437 U.S. 518 (1978).

[25] *McBurney v. Young*, 133 S.Ct. 1709 (U.S., 2013).

fundamental right to earn a living in his chosen profession — obtaining property records on behalf of his clients. The U.S. Supreme Court held that Virginia's FOIA does not violate the Privileges and Immunities Clause, because the clause protects only those privileges and immunities that are "fundamental."[26] The Court cited *Hicklin v. Orbeck* in explaining that, while the Privileges and Immunities Clause protects the right of citizens to "ply their trade, practice their occupation, or pursue a common calling," the Court has in the past struck down laws as violating this privilege only when they were enacted for the protectionist purpose of burdening out-of-state citizens, as in *Toomer v. Witsell*.[27] The Court found that Virginia FOIA's distinction between citizens and noncitizens has a nonprotectionist aim, because Virginia's FOIA exists to provide a mechanism for Virginia citizens to obtain an accounting from their public officials, and noncitizens have no comparable need.

In *McBurney*, the Court reasoned that the distinction between citizens and noncitizens recognized that citizens alone foot the bill for Virginia's fixed costs underlying recordkeeping, and any effect the Act has of preventing citizens of other states from making a profit by trading on information contained in state records is incidental.[28] If the current version of the Alaska Hire statute were challenged, and the Privileges and Immunities Clause analysis used in *McBurney* were applied, a court may distinguish the facts alleged in an Alaska hire case from those alleged in *McBurney* and find that a nonresident's need for a job is comparable to a resident's need for a job, and therefore the statute's effect on nonresidents is more than incidental. However, the likelihood of a finding that Alaska Hire has the protectionist purpose of burdening out-of-state citizens is less predictable. A court may be persuaded that because state funded training programs are geared towards Alaska's hiring needs, the state interest is not protectionist but is reflective of the substantial costs to the state.

If the Alaska Hire statute is challenged and the challenger successfully establishes that the federal Privileges and Immunities Clause applies, the state may or may not be able to satisfy a court that the statute is closely related to the advancement of a substantial state interest. There are strong policy arguments both for and against that showing.

Conclusion

In summary, the current version of AS 36.10.150 was intended to address concerns raised in 1986 by the Alaska Supreme Court, when it found a previous version of the law unconstitutional based on a federal constitutional privileges and immunities analysis. Subsequently, in 1988, art. I, sec. 23 of the Constitution of the State of Alaska was adopted to address equal protection concerns raised by the Alaska Supreme Court in a case challenging another statute that provided a regional hiring preference and to protect

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[26] *Id*, 1714 -1719.

[27] *Id*, 1714 - 1716.

[28] *Id*, 1714 – 1716.

the Alaska Hire law at issue here from challenges. The efficacy of that constitutional amendment as an antidote to equal protection concerns is untested, but it may very well prove to have inoculated AS 36.10.150 from the next state constitutional equal protection challenge. It may be even more significant than all of this that AS 36.10.150 has not been successfully challenged based on a privileges and immunities argument since 1986, or any other constitutional argument since 1989. The current Alaska Hire law has been successfully enforced by preceding attorneys general for 30 years.

AS 36.10.150 was a valid exercise of legislative power under art. II, sec. 1 of the Constitution of the State of Alaska and presumed constitutional. Under art. III, sec. 16 of the Constitution of the State of Alaska, "[T]he governor shall be responsible for the faithful execution of the laws." No controlling authority establishes that AS 36.10.150 is clearly unconstitutional. Moreover, AS 44.23.020(b) requires the attorney general to "bring, prosecute, and defend all necessary and proper actions in the name of the state for the collection of revenue," "prosecute all cases involving violation of state law," and "prosecute all offenses against other state laws where there is no other provision for their prosecution." Therefore, it is outside of the attorney general's authority to declare AS 36.10.150 unconstitutional and direct others to refuse to enforce it, and it likely violates art. III, sec. 16 of the Constitution of the State of Alaska and AS 44.23.020 for the attorney general to refuse to enforce AS 36.10.150 and to fail to prosecute and collect fines from persons who violate it.

Please let me know if you have further questions about this issue.

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